IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-417

GEORGE H. LUSTIG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PHILLIP P. WEIDNER
DRATHMAN, WEIDNER & BRYSON
333 W. Fourth Avenue
Suite 35
Anchorage, Alaska 99501
(907) 276-7000
Attorney for Petitioner

September 12, 1977

Ken Wray's Print Shop, Inc., 323 East Fireweed, Anchorage, Alaska 99503, 907-276-4535

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

RULES

UNITED STATES CODE

U. S. CONSTITUTIONAL PROVISIONS

MISC

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

GEORGE H. LUSTIG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE WARREN E. BURGER, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, George H. Lustig, respectfully prays that a Writ of Ceriorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on June 15, 1977, Petition for Rehearing En Banc denied August 12, 1977.

I. OPINION BELOW.

The opinion of the Ninth Circuit, in *United States v. Lustig*, Slip Op. 1277, No. 76-3146, ____ F.2d ____ (June 15, 1977), Rehearing En Banc denied August 12, 1977, is not yet reported; a copy is attached as Appendix A. No written opinion by the District Court was reported; any written memorandum decisions are reproduced as Appendix B.

II. JURISDICTION.

The opinion in the Court of Appeals was entered June 15, 1977. A timely Petition for Rehearing and Suggestion of the Appropriateness of Rehearing En Banc, filed June 30, 1977, was denied August 12, 1977. Jurisdiction is invoked under 28 U.S.C. 1254(1). The instant Petition is timely under Supreme Court Rule 22(2), since filed within thirty days after entry of final judgment.

III. QUESTIONS PRESENTED FOR REVIEW.

A. WHETHER THE RESENTENCING OF A PROBATIONER TO A CONSECUTIVE SENTENCE AT A PROBATION REVOCATION VIOLATES DOUBLE JEOPARDY WHERE THE SENTENCING JUDGE ON AN INTERVENING CONVICTION REFUSES TO SPECIFY A CONSECUTIVE SENTENCE AND THE PETITION TO REVOKE PROBATION WAS SERVED ON THE PROBATIONER TO INSURE DETENTION DURING THE INTERVENING TRIAL?

B. WHETHER THE SPECIFICATION AT A PROBATION REVOCATION THAT THE SENTENCE IMPOSED IS TO BE CONSECUTIVE TO AN INTERVENING SENTENCE, VIOLATES 18 U.S.C. 3653, 18 U.S.C. 3651, AND 18 U.S.C. 3568,

WHERE THE PETITION TO REVOKE PROBATION HAD BEEN SERVED ON THE DEFENDANT TO INSURE DETENTION DURING THE TRIAL ON THE INTERVENING CONVICTION?

C. WHETHER A PROBATION REVOCATION CAN BE BASED SOLELY ON AN INTERVENING INVALID CONVICTION AND A REFERENCE TO STATEMENTS MADE BY A PROBATIONER ABSENT AN ADEQUATE OPPORTUNITY TO EXPLAIN SAID STATEMENTS?

D. WHETHER THE COURT OF APPEALS CAN REVERSE A PROBATION REVOCATION WHERE PLAIN ERROR IN THE RECORD DEMONSTRATES THAT THE ORIGINAL PLEA WAS INVOLUNTARY, AND DID NOT CONFORM TO THE DICTATES OF *BOYKIN V. ALABAMA*, 395 U.S. 238 (1969), *McCARTHY V. UNITED STATES*, 394 U.S. 459 (1969), CRIMINAL RULE 11, CRIMINAL RULE 7, OR CRIMINAL RULE 5.

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

This case involves the double jeopardy and due process clauses of the Fifth Amendment to the United States Constitution. In addition, the case presents questions dealing with the proper interpretation of 18 U.S.C. 3653, 18 U.S.C. 3651, 18 U.S.C. 3568, and the scope of plain error under Rule 32, 11, 7, and 5, of the Federal Rules of Criminal Procedure.

The pertinent text of each is set out in Appendix C, infra.

V. STATEMENT OF THE CASE.

On September 15, 1976, the Petitioner's probation was revoked. The Court specified that the sentence was to run consecutively and not concurrently with an intervening

sentence. The Petitioner Lustig was originally convicted pursuant to a purported plea of guilty to an Information charging the illegal importing of marijuana in violation of 18 U.S.C. 545. (Hereinafter, the "marijuana" conviction).1/ The probation revocation was based on an intervening conviction for violating United States statutes relating to the controlled substance cocaine. (21 U.S.C. 841, 844, 846). (hereinafter the "cocaine" conviction).2/

1/The purported plea of guilty to the Information was coerced with a total lack of compliance with the Court's rulings in *Boykin v. Alabama*, 395 U.S. 238 (1969), *McCarthy v. United States*, 394 U.S. 459 (1969), Criminal Rule 11, Criminal Rule 7 and Criminal Rule 5. Mr. Lustig was initially coerced to plead guilty in A77-69Cr. (U.S. Dist. Ct. Aka) on May 4, 1972, to a violation of 21 U.S.C. 176(a), in the midst of a jury trial, by the incarceration by the government of a friend of Mr. Lustig for refusing to testify against him, after two previous mistrials had been declared, one due to a hung jury and one due to government misconduct. On June 21, 1973, Mr. Lustig was coerced to plead guilty to an Information charging a violation of 18 U.S.C. 545 by the threat of a mandatory five years incarceration under 21 U.S.C. 1976(a) in violation of the previous plea agreement. (Tr. 11). During portions of the questioning mandated by *McCarthy v. United States, supra, Boykin v. Alabama, supra,* and Rule 11, it developed that the plea was involuntary and the Judge refused to accept the plea and dismissed the Information. After nine months, new counsel entered the case due to a conflict and the plea was purportedly reinstated by "written stipulation," with no new effort to conform to Rule 11, obtain a new grand jury waiver under Ruly 7, rearraign the Defendant under Rule 5, or determine whether "the stipulation" was voluntary.

2/The intervening conviction was in *U.S. v. Lustig, et. al*, No. A76-51 Cr., U.S. D. Crt. Aka. A direct appeal was denied by the Ninth Circuit on June 15, 1977, in No. 76-2661, Slip Op. 1260, ____F.2d ____, (June 15, 1977, Petition for Rehearing En Banc denied August 12, 1977. A Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit with regard to said opinion, has been filed by the Petitioner Lustig on today's date. In addition, the co-defendant below, Gregory D. Pederson, has filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, with regard to the companion appeal, No. 76-2752, Slip Op. 1260, ____ F.2d ____ (9th Cir., June 15, 1977) in U.S. Supreme Court No. 77-5118. The Court is requested to take judicial notice of the record in those proceedings.

At the sentencing on the cocaine conviction, the government argued for a sentence consecutive to the probation revocation, which was impliedly refused by the sentencing Judge. Subsequently, the Petitioner's probation was revoked, based solely on a certified copy of the intervening conviction and references to testimony by the defendant in the cocaine trial that he possessed cocaine for his personal use.

Despite the fact that the warrant for the Petition to Revoke Probation had been served on Mr. Lustig, and used to hold him without bail during his trial on the cocaine charges, and the sentencing Judge on the cocaine charges had refused to impose consecutive time, a different Judge at the probation revocation specified that the five years which was to be reimposed was to be consecutive to the intervening sentence.

VI. REASONS FOR GRANTING THE WRIT OF CERTIORARI.

A. THE IMPORTANT FEDERAL QUESTION OF WHETHER INCREASING THE SEVERITY OF A SENTENCE AT A PROBATION REVOCATION VIOLATES DOUBLE JEOPARDY HAS BEEN DECIDED IN CONFLICT WITH APPLICABLE DECISIONS OF THE OTHER CIRCUITS AND THIS COURT.

An arrest warrant was served on Mr. Lustig pursuant to a Petition to Revoke Probation, under 18 U.S.C. 3653 to deny him pre-trial release and release pending appeal on the cocaine charges.

Judge Von Der Heydt, the sentencing Judge on the cocaine charges, by implication refused to impose consecutive time for the intervening offenses.

1. THE IMPOSITION OF CONSECUTIVE TIME

INCREASES THE SEVERITY OF THE ORIGINAL SENTENCE.

The double jeopardy clause of the Fifth Amendment to the United States Constitution, provides in pertinent part:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . ."

Mr. Lustig was originally sentenced on May 3, 1974, in a judgment which read:

> IT IS ADJUDGED, that the Defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years and fined the sum of $10,000.00. *The execution of the sentence as to imprisonment only is suspended and the Defendant placed on probation for a period of five (5) years under the following terms and conditions*. . (Record 11) (E.A.)

On September 15, 1976, after his probation was revoked, a new order was issued which read in pertinent part:

> . . .IT IS ADJUDGED, that the Defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years. . . *IT IS FURTHER ORDERED, that said sentence is to run consecutively and not concurrently with the sentence imposed in Case No. A76-51 Cr., United States of America v. George Lustig entered on July 9, 1976*. . . (Record 97-98) (E.A.)

Since the Defendant was not originally placed on a suspended imposition of sentence, but was placed on a suspended execution of sentence, he had been sentenced for

purposes of the double jeopardy clause. See *Roberts v. United States*, 320 U.S. 264 (1943).

It is well established that "resentencing" a Defendant to consecutive time, increases the severity of a sentence. *Borum v. United States*, 409 F.2d 433 (9th Cir. 1967). In *United States v. Bowens*, 514 F.2d 440 (9th Cir. 1975), the Court held:

> *"Appellee correctly concedes that the resentencing of the defendant, under Sec. 3651, constituted an increased punishment from the valid portion of that imposed in the first sentence, and that said increase of punishment, for the same offense, violates the double jeopardy clause of the Fifth Amendment. In Re Bradley*, 318 U.S. 50, 63 S.Ct. 470, 87 L.Ed. 500 (1943); *Tatum v. United States*, 114 U.S. App. D.C. 49, 310 F.2d 854 (1962), *United States v. Kenyon*, 519 F.2d 1229 (9th Cir. 1975) (E.A.)

See *United States v. Lancer*, 508 F.2d 719 (3rd Cir. 1975), for the distinction between a suspended execution of sentence and suspended imposition of sentence.[3/] By specifying that the five years was to be consecutive, the Judge at the probation revocation in effect extended his jurisdiction over the Defendant to fourteen years in violation of 18 USC 545 (maximum five years), and 18 U.S.C. 3651. See *United States v. Moore*, 101 F.2d 56 (2d Cir. 1939), cert. denied 306 U.S. 664.

3/See also, *U.S. v. Nagelberg*, 413 F.2d 708, (2d Cir. 1969) cert den'd, 396 U.S. 1010, *Baber v. U.S.*, 368 F.2d 463 (Cir. 1966), *Dominiques v. Hunter*, 170 F.2d 546 (10th Cir. 1948), *U.S. v. You*, 159 F.2d 688 (2nd Cir. 1947), *Gillespie v. Hunter*, 159 F.2d 410 (10th Cir. 1947); See also, *Williams v. U.S.*, 310 F.2d 696 (3rd Cir. 1962), and *U.S. v. Lancer*, 508 F.2d 719 (3rd Cir. 1975) for the proposition that a judge cannot increase a sentence at a probation revocation.

2. THE RESULT CONFLICTS WITH THE PRINCIPLES OF THIS COURT'S DECISIONS AND DECISIONS OF THE OTHER CIRCUITS WITH RESPECT TO THE PERMISSIBLE MECHANISM, UNDER THE DOUBLE JEOPARDY CLAUSE, OF IMPOSING CONSECUTIVE TIME FOR A REVOCATION.

The cases by the Court, or in the other circuits, that have treated similar issues, have held that double jeopardy was not violated, because a warrant was not served, and the sentence need not begin until service of the warrant.[4/]

The leading case with regard to the imposition of "consecutive time" at a revocation deals with parole as opposed to probation. The precise holding, in *Zerbst v. Kidwell*, 304 US 359 (1938), was:

> "The Parole Board and its members have been granted sole authority to issue a warrant for the arrest and return to custody of a prisoner who violates his parole. A member of the Board ordered that respondent be taken into custody after completion of the second sentence.
>
> *Until completion of the second sentence – and before the warrant was served – respondent was imprisoned only by virtue of the second sentence.* There is, therefore, no question as to concurrent service of sentences, unless – as respondent contends – Par. 723(c) required that the

[4/]It appears that due to the timing of the intervening sentencing, and the probation revocation, the opportunity for imposing consecutive time had passed, in that Judge Von Der Heydt, the only Judge having jurisdiction to impose consecutive time, chose not to do so. If the government wished to have Mr. Lustig revoked prior to the sentencing on the cocaine charges, they had 46 days to proceed, after the cocaine trial, and prior to the sentencing with regard to the cocaine charges. This is not a situation in which the government did not have an opportunity to ask for any possible range of sentences from Judge Von Der Heydt, but made a choice as to this sequence. Cf. *Jeffers v. United States*, 97 S.Ct. 2207 (1977) (Double jeopardy aspects dependent on procedural choice as to sequence).

unexpired part of respondent's first sentences begin when he was imprisoned under the second sentence. *That section provides:*

> *'. . . The Board of Parole . . . or any member thereof, shall have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole.* The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution, and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve.' " [emphasis added]

In interpreting a similar question, in *United States v. Tacoma*, 199 F.2d 482 (2d Cir. 1952), the court held:

> "We think the contention is utterly lacking in merit. The statute, 18 U.S.C.A. 3653, provides that 'At any time within the probation period' the probationer may be taken before the court, and 'Thereupon the court may revoke the probation . . . and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed.' It has been authoritatively decided that when a defendant pleads guilty to three indictments and the court imposes a prison sentence under one of the three, it may suspend imposition of sentence on the other two and place the defendant on probation to begin after service of the sentence on the third indictment. *Frad v. Kelly*, 302 U.S. 312, 314, 58 S.Ct. 188, 82 L.Ed. 282.
>
> *We see no reason to doubt that the court's discretion to determine the sequence of sentences is equally broad when the probationer is contemporaneously sentenced for violation of probation and the commission of separate crimes.* See *Mankowski v. United States*, 5 Cir., 148 F.2d 143, 144. *The order in which the prison terms are to be served seems to be a mere matter of form affecting no*

> *conceivable interest of the convict.* Moreover, acceptance of the appellant's contention would mean that where a probationer is already in custody under a state sentence as was the appellant, probation may never be revoked without resulting in making the sentence on the revocation run concurrently with the existing state sentence – a most undesirable result. We find nothing in *Zerbst v. Kidwell*, 304 U.S. 359, 58 S. Ct. 872, 82 L.Ed. 1399, upon which the appellant particularly relies, to support his contention. The order on appeal is affirmed." [emphasis added]

United States v. Tacoma, supra, was cited as controlling in the opinion below, without recognizing that *Tacoma, supra,* merely held that since the sentencing Judge had the power to specify consecutive time for the new offense, the postponing of the execution of a suspended sentence did not violate double jeopardy, since the issue was one of form rather than substance.[5/]

In the instant proceeding, Judge Von Der Heydt was the only Judge that had the power to specify consecutive time,[6/] as to the

5/A similar result was reached in *U.S. v. Liddy*, 510 F.2d 669 (D.C. Cir. 1974), where the court held that a Judge who had the power to reach a particular aggregate term could do so by interuption of the execution of a sentence, by amending the sentence during the term of the court. See also *Crowe v. U.S.*, 200 F.2d 526 (6th Cir. 1962), holding that postponement of the expiration date of a sentence is tantamount to increasing it, if said postponement occurs at a probation revocation. See also the dissent by Circuit Judge McKennon in *Liddy, supra,* which states that, interrupting a sentence violates double jeopardy.

6/It is significant that Judge Von Der Heydt, the Judge at the intervening sentencing, was specifically aware of the pending probation revocation (See Tr. in A76-51 Cr.; sentencing remarks and questioning of defense counsel), and further that the government specifically referred to the pending probation revocation and asked for "separate time, irrespective, in addition to whatever might be given him by Judge Plummer in that case." (Tr. of July 9, 1976, sentencing remarks of U.S. Attorney in A76-51 Cr., pg. 17)

new offense, and thus Judge Plummer, unlike the Judge in *Tacoma, supra,* did not have the power.

In *Brown v. Ohio,* 97 S.Ct. 2221, 2225 (1977), the Court held:

> "The Double Jeopardy Clause – *'protects against a second prosecution for the same offense after conviction.* And – multiple punishment for the same offenses.' – *and from attempts to secure additional punishment after a prior conviction and sentence,* – (citations omitted) (E.A.)

See also, *Green v. United States,* 355 U.S. 184, 187-188 (1957) (attempts at additional punishment); Cf. *North Carolina v. Pearce,* 395 U.S. 711 (1969) (No increased punishment after successful appeal and retrial: credit for time served).

In *United States v. Benz,* 282 U.S. 304, 51 S.Ct.113, 75 L.Ed. 2d 354 (1931), the Court held ". . . the court during the same term may amend . . . the punishment, but not so as to increase it." (*Benz,* at 282 U.S. 307). The instant order by Judge Plummer was years after the initial term had expired.

United States v. Bartholdi, 543 F.2d 1224 (9th Cir. 1972), is also erroneously cited since the case merely indicates that the government can postpone the execution of a warrant, or hearing, while a defendant is incarcerated or in State custody.7/

7/18 U.S.C. 3653 specifically provides that after service of a warrant, the revocation and sentencing shall be "thereupon" conducted. For other cases relying on the significance of the service of the warrant and the precise wording of the parole statute, see *Taylor v. United States Marshal for the Eastern District of Oklahoma,* 352 F.2d 232 (10th Cir. 1965); *Letellier v. Taylor,* 348 F.2d 893 (10th Cir. 1956) cert. den'd. 351 U.S. 972, *Jenkins v. Madigan,* 211 F.2d 904 (7th Cir. 1954), *Zerbst v. Kidwell, supra.*

The instant opinion holds that:

> Consecutive sentences are an appropriate mechanism for imposing a distinct punishment for each of two criminal acts. *U.S. v. Lustig, supra,* Slip Op. No. 1277 at 1279.

While, *Zerbst v. Kidwell, supra,* likewise recognized the necessity of this option. Judge Von Der Heydt was the vehicle for said separate punishment, not Judge Plummer.[8/]

> "If the United States wanted consecutive time the vehicle was through Judge Von Der Heydt. Mr. Edwards indicates that he specifically asked Judge Von Der Heydt not to consider the time. He didn't specifically ask him not to impose consecutive sentences. . . *and he made almost the identical argument that he has made to Your Honor today, that there should be separate sentences, the implication being that Judge Von Der Heydt should have given him whatever time he wanted and ran it consecutively if he decided to.* (Tr. 9/15/76)

B. THE DECISION DECIDES THE IMPORTANT FEDERAL QUESTIONS OF THE PROPER INTERPRETATION OF 18 U.S.C. 3653, 18 U.S.C. 3651, 18 U.S.C. 3568, AND FEDERAL RULE OF CRIMINAL PROCEDURE 32, ON MATTERS THAT HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

8/For other authority with regard to the inability of a Judge to increase the severity of a sentence on a revocation, see *Roberts v. United States,* 320 US 264 (1943), *Wright on Criminal Procedure,* 530 and 532, *Annotation* "Propriety in Imposing Sentence for Original Offense After Revocation of Probation of Considering Acts Because of Which Probation Was Revoked," 65 A.L.R. 3rd 1100, and *Annotation,* "Sentence for New Offense Committed While On Parole or Conditional Release as Concurrent or Consecutive," 166 L.Ed. 811.

The execution of a Petition to Revoke Probation on Mr. Lustig, was not a mere formality.9/ 18 U.S.C. 3653 provides in pertinent part:

> Sec. 3653. Report of probation officer and arrest of probationer.
>
> . . .
>
> As *speedily as possible after arrest* the probationer shall be taken before the court for the district having jurisdiction over him. *Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence*, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed. (E.A.)

18 U.S.C 3651 provides in pertinent part:

> Sec. 3651. Suspension of sentence and probation.
>
> . . .
>
> The period of probation, together with any extension thereof, *shall not exceed five years*. (E.A.)

18 U.S.C. 3568 provides in pertinent part:

> Sec. 3568. Effective date of sentence; credit for time in custody prior to the imposition of sentence.
>
> . . .
>
> *The Attorney General shall give any such person credit toward service of his sentence for any days spent in*

9/The government in essence, wants to "have its cake and eat it" in that it filed a Petition To Revoke Probation, has used said petition, and probation revocation, to insure defendant's incarceration during the trial, sentencing, and appeal, in the companion cocaine case, but now wants to maintain that the service of said Petition to Revoke was a mere formality, such as to defeat the clear language of 18 USC 3653, to the effect that revocation and sentencing shall be conducted "thereupon" after service. Further, the record reflects that Mr. Lustig was denied several times his request to postpone the probation revocation hearing and the probation revocation sentencing until after his appeal in the cocaine case. (See Tr. of 8/31/76, and 9/15/76 in A115-73 Cr. below)

custody in connection with the offense or acts for which sentence was imposed.

. . .

No sentence shall prescribe any other method of computing the term. (E.A.)

The use of the warrant to the benefit of the government, and the denial of a continuance of the hearing or sentencing, violates the clear mandate of 18 U.S.C. 3653 that sentence was to be "thereupon imposed." Said sentence was imposed to begin running at a period past the jursidictional limit of Title 18 U.S.C. 545 and 18 U.S.C. 3651, (five years).[10/]

18 U.S.C. 3568 was violated by the sentence in that Mr. Lustig is being denied credit for all time served in custody in connection with the probation revocation (he is incarcerated now as a result of the no bail status).

The Court should grant certiorari to rule that the clear mandate of 18 U.S.C. 3653, 18 U.S.C. 3651 and 18 U.S.C. 3568 cannot be ignored. Probation should not be extended indefinitely or a probation revocation warrant used as a means of incarcerating a probationer, without an immediate hearing, and the right to begin serving the sentence immediately, with credit for all time served in connection with the offense.[11/]

10/For authority that a revoking Judge may not exceed his jurisdiction by attempting to impose a sentence previously suspended at a time to start after the statutory jurisdictional period for the original offense, see *U.S. v. Sherwood*, 435 F.2d 867 (10th Cir., 1970), cert. den'd, 402 U.S. 909, and *Welsh v. U.S.*, 348 F.2d 885 (6th Cir., 1965). C.F. *Burgess v. Hudspeth*, 120 F. 2d 550 (10th Cir., 1941).

11/For a similar issue, dealing with the problem of delay in parole revocation hearings and the use of a "detainer" prior to the "execution" of a warrant that has been issued, see *Moody v. Daggett*, 97 S.Ct. 274 (1970). The Court based its result in *Moody* on the fact that,

[2] Petitioner's present confinement and consequent liberty loss

C. THE OPINION DECIDES IMPORTANT FEDERAL QUESTIONS AS TO THE STANDARD OF PROOF AND ADMISSIBLE EVIDENCE FOR PROBATION REVOCATION UNDER 18 U.S.C. 3653, WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

While the standard of proof for a probation revocation under 18 U.S.C. 3653 is less than proof beyond a reasonable doubt, it is well established that due process applies to such proceedings.[12]

A probation revocation based solely on an invalid intervening conviction, and references to statements made by the probationer outside the probation revocation hearing, absent an adequate opportunity to explain the statements, violates due process.[13]

(11/cont.)

derives not in any sense from the outstanding parole violator warrant. . .

[In] *Morrissey, supra,* at 488, 92 S.Ct. at 2608, *we established execution of the warrant and custody under that warrant as the operative event triggering any loss of liberty attendant upon parole revocation.* This is a functional designation, for *the loss of liberty as a parole violator does not occur until the parolee is taken into custody under the warrant.* Cf. 18 U.S.C. Sec. 4206 (1970 ed.); 18 U.S.C. Sec. 4213(d). (citations omitted, E.A.)

12/See e.g. *Wolff v. McDonnell,* 418 U.S. 539 (1974), *Gagnon v. Scarpelli,* 411 U.S. 778 (1973) *Morrissey v. Brewer,* 468 U.S. 471, 480 (1972) and *McGinnis v. Stevens,* 543 P 2d 1221, 1226 (AKA, 1975)

13/The revocation was based on a certified copy of the Petitioner's conviction in *United States v. Lustig, et. al,* U.S.D.Ct. AKA No. A76-51 Cr., Ninth Circuit No. 76-2661. That conviction is the subject of a pending Petition for a Writ of Certiorari to the Ninth Circuit Court of Appeals, filed herewith. In addition, the government introduced evidence that Mr. Lustig had testified in his defense at the cocaine case, that he possessed cocaine for personal use. A stay of the probation revocation proceedings was requested in order to allow the defendant to challenge the intervening conviction on appeal, and to take the stand at the probation revocation to explain the statements in A76-71 Cr., without waiving his Fifth Amendment privileges. A stay was denied.

The cases cited by the Ninth Circuit in upholding the bases of the revocation are clearly distinguishable. *Bernal-Zazueta v. United States*, 225 F.2d 64, 68 (9th Cir. 1955), did not deal with a situation in which the defendant was alleged to have made statements, with no adequate opportunity to explain said statements before the revoking Judge.

The distinction is a critical one, since the necessity for an opportunity to explain statements is the basis for the "corpus delicti" rule. [14/] The Court in *Bernal-Zazueta, supra*, specifically relied at 225 F2d 68 on the fact that "this Defendant said in open court that he made such admissions." In *United States v. Miller*, 514 F.2d 41 (9th Cir. 1975), there was no allegation that the conviction relied upon was invalid. The only issue was whether a probation officer could establish, through hearsay, that he had ascertained that a state conviction had been obtained.

> ". . .[A]ppellant did not challenge the accuracy of the information revealed by the testimony in the records. *Miller, supra*, at 514 F.2d 42.

There is no indication in *Miller, supra*, whether the conviction was challenged on appeal.

In *United States v. Carrion*, 457 F2d 808, 809 (9th Cir. 1972), the federal conviction on appeal was a partial basis for revocation; the state conviction which was an alternate basis for revocation was final; and the Judge specifically noted that the violation of State law was sufficient for violation of probation.. In *United States v. Garza*, 484 F2d 88, 89 (5th Cir. 1973), while the federal conviction serving as the basis for the revocation was still on appeal, the Fifth Circuit relied on *United*

14/See Tr. of 8/31/76 in A-115-73 Cr. at 45-57 for desire to explain statements to Judge after appeal in the cocaine case.

States v. Carrion, supra, without indicating that the state conviction in *Carrion* had become final.

Thus, it is imperative that this Court grant certiorari to rule clearly that under 18 U.S.C. 3653, in the absence of clear and independent proof other than mere alleged oral statements, or invalid convictions, probation may not be revoked. Any other result means quite simply that probationers may be subjected to invalid trials, and needless incarceration, as in the instant proceeding; obtaining their freedom only after waiting for relief from an appellate court.

D. THE IMPORTANT FEDERAL QUESTION OF WHETHER PLAIN ERROR UNDER CRIMINAL RULE 5, 7, 11, *BOYKIN V. ALABAMA*, 395 US 238 (1969), AND *McCARTHY V. UNITED STATES*, 394 US 459 (1969), WITH REGARD TO THE VALIDITY OF AN INITIAL PLEA OF GUILTY, MAY JUSTIFY REVERSAL ON APPEAL FROM A PROBATION REVOCATION, HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The record demonstrates, (1) a total lack of conformance with Criminal Rule 5, 7, and 11; (2) a lack of conformance with *Boykin, supra,* and *McCarthy, supra,* and (3) a coerced plea to avoid an invalid sentence and incarceration of a witness. (See Appellant's opening Brief at 41-65, Appellant's Reply Brief, at 11-16 15/

The opinion holds that Mr. Lustig may not "collaterally attack" his original conviction. *United States v. Lustig,* No. 76-3146, Slip Op. 1277, at 1278.

15/ See, e.g. *Blackledge v. Allison,* 97 S.Ct. 1621 (1977) (Procedural Aspects of Habeaus Corpus for unkept plea agreement; record may foreclose necessity for evidentiary hearing, availability of summary judgment).

This ignores the fact Motions to Withdraw Plea of Guilty and to Set Aside Judgment were filed on September 17, 1976, two days after the Order of Revocation was issued on September 15, 1976. (Record 97-100). Further, the revoking Judge was specifically put on notice prior to the sentencing for the probation revocation, or the revocation itself, that the defendant wished to indicate to the Court the circumstances in which he had been coerced to enter the original plea. (Tr. 8/31/76, 9/15/76 in A115-73 Cr. at 40, 41; Appellant's Reply Brief in No. 76-3146 at pg. 68).

The revoking Judge was also specifically put on notice that Mr. Lustig wished a continuance, or an opportunity to explain the effects of the failure to conform to Criminal Rule 11. (Appellant's Reply Brief in No. 76-3146 at pg. 9-11).
pg. 9-11).

The cases cited, being *Bernal-Zazueta v. United States, supra; United States v. Francischine*, 512 F.2d 827 (5th Cir. 1975); and *Rodgers v. United States*, 413 F.2d 251 (10th Cir. 1969), do not deal with situations in which the revoking Judge was put on notice as to the desire to withdraw the plea, or where the record demonstrated plain error in the nature of the plea proceedings.

Accordingly, the Court should grant certiorari, to hold that as with other major violations of substantive rights, an appellant court can reverse a probation revocation where there is plain error appearing in the record as to the validity of the initial plea that served as a basis for the initial conviction.

VII. SUMMARY AND CONCLUSIONS.

The Court should grant certiorari to hold that a probation revocation based on out of court statements and an invalid conviction violates due process, and that a court of appeals may

reverse a probation revocation based on plain error appearing in the record with regard to the validity of the initial plea.

The imposition of a consecutive sentence in the probation revocation hearing, with the facts and circumstances presented by the instant proceeding, violated double jeopardy in that: (1) the government insisted upon instituting a Petition for Revocation and a hearing denying defendant's request for continuance, and as a result, the defendant suffered direct incarceration as a result, (2), the court ignored the mandate of 18 U.S.C. 3651, 3653 and 3568 that a sentence shall be required to be served "thereupon" with credit for time served, (3), specifying execution of said sentence to run consecutive to No. A76-51 Cr. violated double jeopardy, since the Judge revoking probation, Judge Plummer, did not have the power to enforce consecutive time in cause No. A76-51 Cr., after Judge Von Der Heydt refused to do so, such that the Petitioner had stood in jeopardy for the intervening offense, (4), the situation in the cases of *Zerbst, supra, Bartholdi, supra, Tacoma, supra, Liddy, supra,* in which the Defendant should not be allowed to "escape punishment for a portion of his original offense" are not applicable in the instant case due to the opportunity of the government to revoke probation prior to sentencing with regard to the new offense, and due to the actual service of the Petition to Revoke with the corresponding harm of incarceration.

Accordingly, the government has reached through the revocation, a sentence refused by the Judge on the intervening offense, and Mr. Lustig's rights to due process and protection against double jeopardy have been violated. Thus, this Court should grant Certiorari in order to rule clearly that such a circumvention of the statutory and constitutional protections against double jeopardy, and needless incarceration without due process, shall not stand.

RESPECTFULLY SUBMITTED this 12th day of September, 1977, at Anchorage, Alaska.

PHILLIP P. WEIDNER, Attorney
for Petitioner, George H. Lustig
DRATHMAN, WEIDNER & BRYSON
333 W. Fourth Avenue
Suite 35
Anchorage, Alaska 99501

CERTIFICATE OF SERVICE BY MAIL

I hereby certify, that pursuant to Rule 21(1), Rule 33(1), Rule 33(2) (a), and Rule 33(3) (b), of the Supreme Court Rules of Appellate Procedure, that I am a member of the Bar of the U.S. Supreme Court in good standing, and that three copies of the foregoing Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit were served upon counsel for the Respondent, by depositing the same in the United States mail at Anchorage, Alaska, postage pre-paid, addressed to:

Mr. G. Kent Edwards
U. S. Attorney
605 West Fourth Avenue
Anchorage, Alaska 99501

and further, that three copies of the foregoing Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Ninth Circuit were served upon the Solicitor General of the United States by depositing the same in the United States mail, at Anchorage, Alaska, air-mail, postage pre-paid, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

DATED at Anchorage, Alaska this 12th day of September, 1977.

PHILLIP P. WEIDNER, Attorney
for Petitioner, George H.
Lustig

APPENDIX A – OPINION OF THE NINTH CIRCUIT COURT OF APPEALS IN *U.S. V. LUSTIG*, NO. 76-3146, AND ORDER DENYING REHEARING EN BANC.

UNITED STATES of America,
Plaintiff - Appellee,
v.
George H. LUSTIG,
Defendant - Appellant
No. 76-3146.
United States Court of Appeals,
Ninth Circuit.
June 15, 1977.

Following cocaine conviction the United States District Court for the District of Alaska, Raymond E. Plummer, J., revoked defendant's probation and reimposed five-year sentence assessed against defendant on prior marijuana conviction, and defendant appealed. The Court of Appeals held that: (1) since certified copy of cocaine conviction was unchallenged such certificate itself constituted sufficient proof that defendant had committed a crime in violation of terms of probation; (2) neither original marijuana conviction nor subsequent cocaine conviction could be collaterally attacked and (3) imposition of consecutive sentences was not improper.

Affirmed.

1. Criminal Law – 982.9(1)

Probation may be revoked where the judge is reasonably satisfied that a state or federal law has been violated.

2. Criminal Law – 982.9(5)

Since certified copy of subsequent cocaine conviction was unchallenged such certificate, in itself, constituted sufficient proof that defendant, who suffered the cocaine conviction while on probation following prior marijuana conviction, had committed a crime in violation of terms of probation; furthermore, excerpts of defendant's testimony at the trial on the cocaine charges, during which he admitted possessing cocaine, further supported determination to revoke probation and reimpose sentence. 18 U.S.C.A. § 545.

3. Criminal Law – 982.9(2)

Neither original marijuana conviction nor subsequent cocaine conviction resulting in revocation of probation could be collaterally attacked and, hence, validity of such convictions could not be asserted as grounds for reversal of district court's order revoking probation and reimposing sentence on the marijuana conviction. 18 U.S.C.A. § 545.

4. Criminal Law – 982.9(8)

On revoking probation district court was not without power to order that five-year sentence imposed on original marijuana conviction run consecutively to intervening nine-year sentence imposed on cocaine conviction, which conviction lead to revocation proceedings. 18 U.S.C.A. § 545.

5. Criminal Law – 982.9(8)

In reinstating a sentence on revocation of probation, the district court may, in its discretion, order that the sentence be served consecutive to a federal sentence for an intervening crime to insure that the defendant is punished both for the original conviction and the subsequent offense.

6. Criminal Law – 991(1)

Consecutive sentences are an appropriate mechanism for imposing a distinct punishment for each of two criminal acts.

Appeal from the United States District Court for the District of Alaska.

Before CARTER, TRASK and KENNEDY, Circuit Judges.

PER CURIAM:

On May 3, 1974 Lustig pleaded guilty to a charge of smuggling marijuana in violation of 18 U.S.C. § 545 (hereinafter the marijuana conviction). He was fined $10,000 and sentenced to a five-year prison term. The prison term was suspended and Lustig was placed on probation subject to normal conditions, including the requirement that Lustig not violate any law and that he not leave the state.

In 1976 Lustig was convicted on four separate counts of conspiring to distribute a controlled substance, distribution of cocaine, possession of with intent to distribute cocaine, and simple possession of cocaine. He was sentenced to a total of nine years' imprisonment. Thereafter, the district court revoked Lustig's probation and reinstated the original five-year sentence for the marijuana conviction. In its judgment pronouncing sentence, the court expressly provided that the five-year sentence was to be consecutive to the intervening nine-year sentence on the cocaine conviction. Lustig appeals from the district court's orders revoking probation and reimposition of sentence on the marijuana conviction. We affirm.

[1,2] Lustig first contends that the evidence was insufficient to support revocation of his probation. The claim is without merit. Probation may be revoked where the judge is reasonably satisfied that a state or federal law has been violated. *United States v. Carrion*, 457 F.2d 808, 809 (9th Cir. 1972). The Government introduced a certified copy of Lustig's cocaine

conviction at the revocation proceeding. This was unchallenged and in itself constituted sufficient proof that Lustig had committed a crime in violation of the terms of his probation. *United States v. Miller*, 514 F.2d (9th Cir. 1975); *United States v. Winsett*, 518 F.2d 51, 55 n. 6 (9th Cir. 1975) (dictum). The Government also introduced excerpts of Lustig's testimony at the trial on the cocaine charges during which he admitted possessing cocaine. That testimony further supports the district court's determination. *Bernal-Zazueta v. United States*, 225 F.2d 64, 68 (9th Cir. 1955).

[3] Lustig next attacks the validity of both the original marijuana conviction and the cocaine conviction and argues that their invalidity requires reversal of the probation revocation order. However, Lustig may not collaterally attack either the original conviction, *Bernal-Zazueta v. United States*, 225 F.2d at 68; *United States v. Francischine*, 512 F.2d 827 (5th Cir. 1975); *Rodgers v. United States*, 413 F.2d 251 (10th Cir. 1969), or the conviction on which the decision to revoke probation was based, *United States v. Garza*, 484 F.2d 88, 89 (5th Cir. 1973); see *United States v. Carrion*, 457 F.2d at 809. The validity of the marijuana and cocaine convictions are issues that are therefore not properly before us and may not here be asserted as grounds for reversing the district court's order in these proceedings.

[4-6] Finally, Lustig claims that the district court upon revoking probation had no power to order that the five-year sentence on the original conviction should run consecutively to the intervening nine-year sentence. We disagree. In reinstating a sentence upon revocation of probation, the district court may in its discretion order that the sentence be served consecutive to a federal sentence for an intervening crime to insure that the defendant is punished both for the original conviction and the

subsequent offense. *United States v. Tacoma*, 199 F.2d 482 (2d Cir. 1952); *cf. United States v. Bartholdi*, 453 F.2d 1225, 1226 (9th Cir. 1972). Consecutive sentences are an appropriate mechanism for imposing a distinct punishment for each of two criminal acts. The district court's imposition of the consecutive sentence in this case was not improper.

Lustig's other contentions are without merit.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. **GEORGE H. Lustig, et al.,** *Defendants-Appellants.*	)	**No. 76-2661**
UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. **GEORGE H. Lustig,** *Defendant-Appellants.*	)	**No. 76-3146**
	)	**ORDER**

Before: CARTER, TRASK and KENNEDY, Circuit Judges.

The panels in the above entitled cases have voted in each case to deny the petition of defendant-appellant Lustig for rehearing. Judges Trask and Kennedy in each case have voted to reject the suggestion for rehearing en banc of defendant-appellant Lustig, and Judge Carter so recommends.

The petitions for rehearing and suggestion for rehearing en banc having been circulated to all active judges and no judge having voted for a rehearing en banc,

IT IS ORDERED that the petition for rehearing in each case is DENIED, and the suggestion for rehearing en banc in each case is REJECTED.

(Filed 8/12/77)

APPENDIX B – INFORMATION, WRITTEN DECISIONS AND ORDERS OF THE DISTRICT COURT, AND DOCUMENTS RELATING TO PLEA WITHDRAWAL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, *Plaintiff,*	)	
v.	)	**CR. NO. A-115-73 Cr.**
GEORGE LUSTIG, *Defendant.*	)	**In Violation of *Title 18, U.S.C. Section 545* SMUGGLING MERCHANDISE**

INFORMATION

THE UNITED STATFS ATTORNEY CHARGES:

That on or about June 18, 1969, at Anchorage International Airport, Anchorage, Alaska, in the District of Alaska, defendant GEORGE LUSTIG did smuggle and cladestinely introduce into the United States, knowingly and with intent to defraud the United States, merchandise, to wit: approximately nine (9) pounds of hashish, having failed to invoice said merchandise, all in violation of Title 18, United States Code, Section 545.

DATED at Anchorage, Alaska this 21st day of June, 1973.

G. Kent Edwards
United States Attorney
By: /s/ Peter M. Page
Assistant U. S. Sttorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA.)
Plaintiff,)
)
vs.)
GEORGE LUSTIG.)
Defendant.)
)

No. A-115-73 Cr.

ORDER DISMISSING INFORMATION WITHOUT PREJUDICE

After due consideration, *it is ORDERED that the information filed in the above entitled case on June 21, 1973, is hereby dismissed without prejudice.*

/s/ Raymond E. Plummer
Senior Judge

DATED JUN 25, 1973

Copies mailed to:

Peter Page, Esq., Assistant
U. S. Attorney
Michael Rubenstein, Esq.

(E. A.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	**No. A-115-73 CR.**
v.	)	
GEORGE LUSTIG,	)	
Defendant.	)	**STIPULATION**

IT IS HEREBY STIPULATED BETWEEN the Defendant GEORGE LUSTIG: his counsel, Wendell P. Kay: and JOHN D. ROBERTS, Assistant United States Attorney, as follows:

WHEREAS this above case has been set for sentencing on March 29, 1974, before this Honorable Court, the parties hereto desire to make the foregoing statement and stipulation:

Defendant *GEORGE LUSTIG agrees that he will make no effort to set aside or to modify in any way the Order of this Court dated March 4, 1974, including the findings set forth therein;*

Defendant GEORGE LUSTIG has *freely and voluntarily entered his plea of guilty to the one count information* filed June 21, 1973, which charges a violation of Title 18, United States Code, Section 545.

The UNITED STATES recommends that the following sentence be imposed upon GEORGE LUSTIG in Case No. A-115-73 CR.:

That defendant GEORGE LUSTIG be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years and pay a fine to the UNITED STATES in the amount of $10,000.

A 60-day stay of execution is hereby granted, and upon the condition that the defendant pays $7,500 of said fine within 60 days from the date of this Order, the defendant shall be placed on probation under the standing conditions of this Court and the balance of this sentence suspended.

DATED and entered into this 3 day of May, 1974, at Anchorage, Alaska.

G. KENT EDWARDS
United States Attorney
By: /s/ John D. Roberts
Assistant U.S. Attorney
/s/ Wendell P. Kay,
Attorney for defendant

I, GEORGE LUSTIG, have read the foregoing Stipulation and agree to the recommendations of counsel.

DATED this 3 day of March, 1974, at Anchorage, Alaska.

/s/ George Lustig,
Defendant

SUBSCRIBED AND SWORN TO before me this 3 day of March, 1974, at Anchorage, Alaska.

/s/ Kim Denise Mizar
Notary Public in and for Alaska
My commission expires: 4/24/78

Approved May 3, 1974
/s/ Raymond E. Plummer
Senior Judge

(E. A.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,)
Plaintiff,)
)
vs.)
GEORGE LUSTIG,)
Defendant.)
)

No. A-115-73 Cr.

MEMORANDUM AND ORDER

The court has reviewed and considered (1) the reporter's transcript of *plea for the proceedings held on May 4*, 1972, in *Case No. A-79-69 Cr.*, entitled U.S. v. George Lustig; (2) the reporter's transcript of proceedings held on *June 21, 1973, in Case No. A-115-73 Cr.*, entitled U.S. v. Geroge Lustig; (3) the proceeding held on *January 26, 1973, in Case No. A-79-69 Cr.*,; (4) all evidence admitted during the trials in A-79-69 Cr.; and (5) the opinion of the Supreme Court of the United States in *North Carolina v. Alford*, 400 U.S. 25.

Having done so, and having heretofore addressed the defendant personally, *the court finds (1) the plea of guilty entered by defendant on June 21, 1973, in Case No. A-115-73 Cr.* was made intelligently, voluntarily, knowingly and with complete understanding of the nature of the charge and the consequences of the plea; (2) there is a *factual basis* for the plea of guilty; and (3) an order should be entered *reinstating the information filed in Case No. A-115-73 Cr. on June 21, 1973, and dismissed by the court without prejudice on June 25, 1973; and (4) that the plea of guilty should now be accepted by the court.*

Accordingly, it is ORDERED as follows:

1. The information filed in Case No. A-115-73 Cr. on June

21, 1973, and dismissed by the court without prejudice on June 25, 1973, is *hereby reinstated fully and for all purposes.*

2. The time for imposition of sentence is hereby set at the hour of 1:30 p.m. on Friday, March 29, 1974.

3. Unless subsequently convinced to the contrary, it is the court's intention in sentencing the defendant to carry into effect the recommendation previously made to the court by counsel for the parties.

/s/ Raymond E. Plummer
Senior Judge

DATED: March 4, 1974
Copies mailed to:
G. Kent Edwards, Esq., U. S. Attorney
Michael Rubinstein, Esq.
Edgar Paul Boyko, Esq.
George Lustiz

(E. A.)

MINUTES OF
THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA vs. GEORGE LUSTIG.

xx HON. RAYMOND E. PLUMMER — **No. A-115-73 Cr.**
Deputy Clerk
Jim Mayers
xx Jeri Whitaker
HON. JAMES A. VON DER HEYDT
Reporter
xx Nancy Markle
Dolores Runner

APPEARANCES:

PLAINTIFF: John Roberts, Assistant U.S. Attorney

DEFENDANT: Michael Rubinstein, Retained
(Wendall P. Kay, Retained)

PROCEEDINGS: Imposition of sentence.

At 1:30 P.M., court convened.

Mr. Rubinstein re motion for order allowing substitution of attorney.

Motion filed.

M/O It is hereby ordered that Michael Rubinstein be discharged as attorney of record, and substituting in his place Wendall Kay *for the reason that defendant and his present counsel are in irreconcilable conflict and defendant wishes Mr. Kay to undertake his representation at this juncture.*

Mr. Kay requests sentencing be set over while he reviews filed.

Imposition of sentence set for 9:30 A.M., May 3, 1974.

At 1:45 court recessed.

DATE: March 29, 1974

cc: U. S. Attorney
Michael Rubinstein
Wendall P. Kay

INITIALS /s/ J. W.
Deputy Clerk

(E. A.)

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF ALASKA

UNITED STATES OF AMERICA	)	
	)	
v.	)	**No. A-115-73 Criminal**
GEROGE LUSTIG	)	
	)	

On this 3rd day of May, 1974 came the attorney for the government and the defendant appeared in person and by counsel, Wendell P. Kay.

IT IS ADJUDGED that the defendant upon his plea of guilty has been convicted of the offense of Smuggling Merchandise in violation of Title 18, U.S.C. Section 545, as charged in the information and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years and fined the sum of $10,000. The execution of the sentence as to imprisonment only is suspended and the defendant placed on probation for a period of five (5) years under the following terms and conditions.

1. That he obey all local, state and federal laws.
2. That he comply with the rules and regulations of the probation department.
3. That on the condition that the defendant pay $7,500 within 60 days of the date of this order, the $2,500 balance will thereupon be deemed remitted or suspended.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Raymond E. Plummer
United States District Judge

By: /s/ Jeri Whiteher
Deputy Clerk.

The Court recommends commitment to

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,)
Plaintiff,)
)
vs.)
GEORGE LUSTIG,)
Defendant.)
)

A-115-73 Criminal

ORDER REVOKING SUSPENDED SENTENCE AND PROBATION

and

JUDGMENT AND COMMITMENT

This cause coming on for hearing on August 31, 1976 upon the application of Merlyn M. Runestad, United States Probation Officer, for revocation of suspended sentence and probation, such sentence having been entered in this cause on the 3rd day

of May, 1974 upon a plea of guilty by said defendant on a charge of Smuggling Merchandise as charged in the Information on file: Plaintiff represented by United States Attorney G. Kent Edwards: Defendant in custody and represented by Philip Weidner, retained counsel; and the defendant having been found guilty of violating said probation, and the Court being fully advised in the premises,

IT IS HEREBY ORDERED that the suspended execution of sentence and probation for a period of five (5) years entered against the defendant on the 3rd day of May, 1974, be and the same is hereby revoked.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years and fined the sum of Ten Thousand Dollars ($10,000).

IT IS FURTHER ORDERED that said sentence is to run consecutively and not concurrently with the sentence imposed in Case No. A76-51 Cr., United States of America vs. George Lustig, entered on July 9, 1976.

IT IS ORDERED that the Clerk deliver a certified copy of this sentence to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

DATED at Anchorage, Alaska this 15th day of September, 1976.

/s/ Raymond E. Plummer
United States District Judge

cc: U. S. Marshal
U. S. Attorney
Probation Office
Phillip P. Weidner

Phillip P. Weidner
900 West Fifth Avenue
Anchorage, Alaska 99501
907-276-7000
Attorney for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, *Plaintiff,*	**MOTION TO WITHDRAW PLEA OF GUILTY OR IN THE ALTERNATIVE, MOTION TO SET ASIDE THE JUDGMENT FOR MANIFEST INJUSTICE**
vs.	
GEORGE LUSTIG, *Defendant.*	

COMES NOW the defendant, GEORGE LUSTIG, by and through his attorney, PHILLIP P. WEIDNER, and hereby moves this court to allow him to withdraw his plea of guilty previously entered in this case on May 3, 1974. In the alternative, the defendant respectfully requests this court to set aside the judgment and conviction and permit the defendant to withdraw his plea. This motion is made pursuant to Federal Rules of Criminal Procedure 32(d).

This motion is made on the grounds that the original plea in this case was not entered voluntarily, but further, was the product of coercion and threats by the government against a potential witness for the Government. Specifically, it is the position of the defendant that he would not have entered the original plea, but for the threats by the Government to have a close friend and associate incarcerated for a period of 18 months for refusal to testify against the defendant.

Further, said facts were brought to the attention of the

sentencing judge prior to the imposition of sentence in the instant case on September 15, 1976, by the defendant exercising his right of elocution. Further, the judge imposing sentence specifically acknowledged his awareness of said remarks by the defendant.

Thus, it is the position of the defendant that the plea should be set aside to correct manifest injustice. See *McKinnon v. State*, 526 P.2d 18 (Alaska 1974).

Further, should the Government contest any of the defendant's contentions with regard to the fact that his plea was coerced and involuntary, the defendant respectfully requests an evidentiary hearing.

Respectfully submitted this 17th day of September, 1976, at Anchorage, Alaska.

/s/ Phillip P. Weidner
Attorney for Defendant

APPENDIX C – CONTAINS CONSITUTIONAL PROVISIONS STATUTES, RULES, REGULATIONS, INVOLVED.

TEXT OF AMENDMENTS TO THE U.S. CONSTITUTION

AMENDMENT [V]

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

U.S. STATUTES

18 U.S.C. 3568. Effective date of sentence; credit for time in custody prior to the imposition of sentence.

The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. As used in this section, the term "offense" means any military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by the Act of Congress.

If any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run

from the date on which he is received at such jail or other place of detention.

No sentence shall prescribe any other method of computing the term.

18 U.S.C. 3651. Suspension of sentence and probation.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments,

but, in the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the conditions thereof, the defendant –

> May be required to pay a fine in one or several sums; and
>
> May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and
>
> May be required to provide for the support of any persons, for whose support he is legally responsible.

The defendant's liability for any time or other punishment imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation.

18 U.S.C. 3653. Report of probation officer and arrest of probationer.

When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

Whenever during the period of his probation, a probationer heretofore or hereafter placed on probation, goes from the district in which he is being supervised to another district, jurisdiction over him may be transferred, in the discretion of the court, from the court for the district from which he goes to

the court for the other district, with the concurrence of the latter court. Thereupon the court for the district to which jurisdiction is transferred shall have all power with respect to the probationer that was previously possessed by the court for the district from which the transfer is made, except that the period of probation shall not be changed without the consent of the sentencing court. This process under the same conditions may be repeated whenever during the period of his probation the probationer goes from the district in which he is being supervised to another district.

At any time within the probation period, the probation officer may for cause arrest the probationer wherever found, without a warrant. At any time within the probation period, or within the maximum probation period permitted by section 3651 of this title, the court for the district in which the probationer is being supervised or if he is no longer under supervision, the court for the district in which he was last under supervision, may issue a warrant for his arrest for violation of probation occurring during the probation period. Such warrant may be executed in any district by the probation officer or the United States marshal of the district in which the warrant was issued or of any district in which the probationer is found. If the probationer shall be arrested in any district other than that in which he was last supervised, he shall be returned to the district in which the warrant was issued, unless jurisdiction over him is transferred as above provided to the district in which he is found, and in that case he shall be detained pending further proceedings in such district.

As speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser

sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 5.

INITIAL APPEARANCE BEFORE THE MAGISTRATE

(a) In General. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available federal magistrate or, in the event that a federal magistrate is not reasonably available, before a state of local judicial officer authorized by 18 U.S.C. 3041. If a person arrested without a warrant is brought before a magistrate, a complaint shall be filed forthwith which shall comply with the requirements of Rule 4(a) with respect to the showing of probable cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate, the magistrate shall proceed in accordance with the applicable subdivisions of this rule.

(b) Minor Offenses. If the charge against the defendant is a minor offense triable by a United Stated Magistrate under 18 U.S.C. 3401, the United States magistrate shall proceed in accordance with the Rules of Procedure for the Trial of Minor Offenses Before united States Magistrates.

(c) Offenses Not Triable by the United States Magistrate. If the charge against the defendant is not triable by the United States magistrate, the defendant shall not be called upon to plead. The magistrate shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of the general

circumstances under which he may secure pretrial release. He shall inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall also inform the defendant of his right to a preliminary examination. He shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided by statute or in these rules.

A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate shall forthwith hold him to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial appearance if the defendant is in custody and no later than 20 days if he is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is filed in the district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interests of justice.

Rule 7.
THE INDICTMENT AND THE INFORMATION

(a) Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

(b) Waiver of Indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment.

(c) Nature and Contents.

(1) In General. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law swhich the defendant is alleged therein to have violated.

(2) Criminal Forefeiture. When an offense charged may result in a criminal forfeiture, the indictment or the information shall allege the extend of the interest or property subject to forefeiture.

(3) Harmless Error. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

(d) Surplusage. The court on motion of the defendant may strike surplusage from the indictment or information.

(e) Amendment of Information. The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

(f) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

Rule 11.
PLEAS

(a) Alternatives. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective adminstration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant

personally in open court and inform him or, and determine that he understands, the following:

(1) the nature of the charge ot which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he had the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury of false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force of threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty

or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(d) Plea Agreement Procedure.

(1) In General. The attorney for the government and the attorney for the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lessor or related offense, the attorney for the government will do any of the following:

(A) move for dismissal or other charges; or
(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
(C) agree that a specific sentence is the appropiate disposition of the case.

The court shall not participate in any such discussions.

(2) Notice of Such Agreement. If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) Acceptance of a Plea Agreement. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) Rejection of a Plea Agreement. If the court rejects the plea agreement, the court shall, on the record,

inform the parties of the fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of Pleas, Offers of Pleas, and Related Statements. Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to, a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

(f) Determining Accuracy of Plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satsify it that there is a factual basis for the plea.

(g) Record of Proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made

and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

Rule 32
SENTENCE AND JUDGMENT

(a) Sentence.

(1) Imposition of Sentence. Sentence shall be imposed without unreasonable delay. Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. The attorney for the government shall have an equivalent opportunity to speak to the court.

(2) Notification of Right to Appeal. After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

(b) Judgment.

(1) In General. A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any

other reason is entitled to be discharged, judgment shall be entered accordingly. The judgment shall be signed by the judge and entered by the clerk.

(2) Criminal Forefeiture. When a verdict contains a finding of property subject to a criminal forfeiture, the judgment of criminal forefeiture shall authorize the Attorney General to seize the interest or property subject to forfeiture, fixing such terms and conditions as the court shall deem proper.

(c) Presentence Investigation.

(1) When Made. The probation service of the court shall make a presentence investigation and report to the court before the imposition of sentence or the granting of probation unless, with the permission of the court, the defendant waives a presentence investigation and report, or the court finds that there is in the record information sufficient to enable the meaningful exercise of sentencing discretion, and the court explains this finding on the record.

The report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a presentence report at any time.

(2) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

(3) Disclosure.

(A) Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation exclusive of any recommendation as to sentence, but not to the extent that in the opinion of the court the report contains diagnostic opinion which migh seriously disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information which, if disclosed, might result in harm, physical or otherwise, to the defendant or other persons; and the court shall afford the defendant or his counsel an opportunity to comment thereon and, at the discretion of the court to introduce testimony or other information relating to any alleged factual inaccuracy contained in the presentence report.

(B) If the court is of the view that there is information in the presentence report which should not be disclosed under subdivision (c) (3) (A) of this rule, the court in lieu of making the report or part thereof available shall state orally or in writing a summary of the factual information contained therein to be relied on in determining sentence, and shall give the defendant or his counsel an opportunity to comment thereon. The statement may be made to the parties in camera.

(c) Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government.

(D) Any copies of the presentence investigation report made available to the defendant or his counsel and the attorney for the government shall be returned to the probation officer immediately following the

imposition of sentence or the granting of probation, unless the court, in its discretion otherwise directs.

(E) The reports of studies and recommendations contained therein made by the Director of the Bureau of Prisons or the Youth Correction Division of the Board of Parole pursuant to 18 U.S.C. Sec 4208(B), 4252, 5010(e), or 5034 shall be considered a presentence investigation within the meaning of subdivision (c) (3) of this rule.

(d) Withdrawal of Plea of Guilty. A motion to withdraw a plea of guilty or nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

(e) Probation. After conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation if permitted by law.

(f) Revocation of Probation. The court shall not revoke probation except after a hearing at which the defendant shall be present and apprised of the grounds on which such action is proposed. The defendant may be admitted to bail pending such hearing.

APPENDIX D – DOCUMENTS FROM THE RECORD RELATING TO THE SERVICE OF THE PETITION TO REVOKE, THE EFFECTS THEREOF, DENIAL OF ALL BAIL, AND THE REQUEST FOR A STAY OF THE PROCEEDINGS

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF ALASKA

UNITED STATES OF AMERICA	)	
v.	)	**No. A-115-73 Cr.**
GEORGE LUSTIG	)	

To U. S. Marshal or any other authorized officer

You are hereby commanded to arrest George Lustig and bring him forthwith before the United States District Court for the District of Alaska in the city of Anchorage to answer to charges that he has violated the conditions of probation imposed by the United States District Court for the District of Alaska on May 3, 1974. Bail set $100,000.00 cash or corporate surety.

J. M. KRONINGER Clerk
By /s/ Mary Keeney
Deputy Clerk

Date March 15, 1976

RETURN

District of Alaska Received the within warrant the 15th day of March 1976 and executed same, by the arrest of George Harry LUSTIG.

ROBERT D. OLSON SR.,
US MARCHAL

By /s/ John A. McKay
Deputy US Marshal

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, *Plaintiff,*	**Crim. No. A-115-73**
v.	**MOTION TO HOLD**
GEORGE LUSTIG, *Defendant.*	**DEFENDANT WITHOUT BAIL PENDING HEARING ON REVOCATION OF PROBATION**

COMES NOW the United States of America, by G. Kent Edwards, United States Attorney for the District of Alaska, and moves this Honorable Court that the defendant GEORGE LUSTIG be held without bail pending hearing on revocation of probation. This motion is based on the reasons set forth in the attached memorandum.

DATED this 2nd day of April, 1976, at Anchorage, Alaska.

/s/ G. Kent Edwards
United States Attorney

ORDER

For the reasons set forth in the government's memorandum in support of motion to hold defendant without bail pending hearing on revocation of probation, as well as those previously noted by the Court in its bail review check list filed March 26, 1976,

IT IS HEREBY ORDERED that George Lustig be held without bond pending hearing on the petition to revoke his probation in Cause No. A-115-73 Criminal.

DATED this 2nd day of April, 1976, at Anchorage, Alaska.

/s/ Raymond E. Plummer
U.S. District Court Judge

ORDER

It is hereby ordered that the Order entered on March 16, 1976 setting bail in this case in the amount of $50,000.00 cash or corporate surety, is hereby vacated and set aside and it is now and hereby ordered that the defendant be held without bail pending the final hearing on the government's petition for revocation of probation.

Court adjourned at 4:40 p.m.

cc: U. S. Attorney
U. S. Marshal
U. S. Probation Officer
Kermit E. Barker

MINUTES OF
THE UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

UNITED STATES OF AMERICA, v. GEORGE LUSTIG

No. A-115-73 CR

THE HONORABLE RAYMOND E. PLUMMER, U.S. DISTRICT JUDGE

Deputy Clerk	Reporter
X Jim Meyers	Dolores Runner
Jeri Whitaker	X Mary Krogstad
Jan Nelson	Sandra Shorey

APPEARANCES: Plaintiff: U. S. Attorney G. Kent Edwards.

Defendant: Present in custody represented by William H. Fuld (Retn'd)

At 11:03 A.M. Court convened:

PROCEEDINGS: HEARING ON BAIL REVIEW AND TO

DETERMINE STATUS OF DEFENDANT'S LEGAL REPRESENTATION

Counsel for the Government objected to further bail hearing for this defendant. Argument of counsel heard.

The Court ruled a bail review hearing to be held at this time.

Statement of counsel for defendant Lustig heard.

Defendant George Harry Lustig called, sworn and testified on own behalf.

Statement of counsel for the Government heard.

The court denied motion for reduction of bail.

Court's exhibit 1 admitted.

Bail Review Check List completed by the Court and ordered filed.

Counsel for the Government moved that Order Specifying Methods and conditions of Release be amended.

Arguments of counsel heard.

M.O.

In addition to terms and conditions, heretofore imposed by the Court in lieu of committing Mr. Lustig after conviction without bail, it is ordered that Mr. Lustig is restrained and enjoined from transferring, conveying, or otherwise encumbering his personal or mixed property without written permission of this Court until the pending petition for revocation of Probation has been heard and determined; provided however, with the written approval of the Court the assets of the defendant above mentioned may be pledged or otherwise encumbered to guarantee the payment of attorney fees or costs or expenses that may be encurred in preparation of defendant's case in an amount to be approved by the Court in writing.

Statement of counsel heard re hearing on petition for revocation of probation.

Statement of Robert H. Wagstaff, an attorney who was in the audience, re counsel for defendant. Mr. Wagstaff asked by the

Court to report no later than Monday morning, April 29, 1976 re progress being made in obtaining counsel for Mr. Lustig,

Hearing on petition for revocation of probation to be held Friday, April 2, 1976 at 10:30 A.M. as previously set by the Court's written order of March 25, 1976.

At 12:57 P.M. court adjourned.

Initials
/s/ J. M.
Deputy Clerk

DATE: March 26, 1976
cc: U. S. Attorney G. Kent Edwards
William H. Fuld, Esq.

Mr. Phillip P. Weidner
900 West Fifth Avenue
Anchorage, Alaska 99501

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA, *Plaintiff,*	)	**Cause No. A-115-73 Cr.**
vs. vs.	)	**AFFIDAVIT IN SUPPORT**
GEORGE LUSTIG, et al., *Defendants,*	)	**OF MOTION FOR MODIFICATION OR MOTION TO SET BAIL**
STATE OF ALASKA	)	ss.
THIRD JUDICIAL DISTRICT	)	

COMES NOW the affiant, PHILLIP P. WEIDNER, and first being duly sworn, deposes and says:

1. I am the attorney of record for Mr. George Lustig in the tiral of this matter.

2. As reflected by the attached affidavit of motion for

continuance, Mr. Lustig has been experiencing considerable difficulties in obtaining counsel of his choice, and further, I have had only minimal opportunity to conduct pre-trial investigations in these proceedings.

3. Due to the state of the correctional facilities at 6th Avenue and C Street, Anchorage, Alaska, it is often difficult or impossible to conduct private communications with clients without substantial waiting periods (half an hour to an hour and one-half).

4. Due to the current facilities it is often necessary to wait substantial periods before even seeing clients.

5. There is currently filed in the state courts, a class action suit against those officials charged with maintaining the facilities at 6th Avenue and C Street.

6. One of the causes of action in the said suit is the allegation that the current facilities, and the current practices with regard to phone calls and messages, violate pre-trial detainees' right to effective assistance of counsel of choice.

7. After speaking with Mr. Lustig it appears that it will be necessary to his constitutional rights to call witnesses constitutional rights to confrontation and cross-examination, and constitutional rights to effective assistance of counsel, that numerous witnesses be contacted and interviewed by the defense.

8. A number of the aforementioned witnesses live in rural portions of Alaska, such that their location will be difficult, if not impossible, to determine on short notice, unless Mr. Lustig was free to assist myself or my defense investigator in locating said witnesses.

9. It appears necessary to effective assistance of counsel for Mr. Lustig to accompany me to view the scene of some of the alleged transactions in the instant proceedings, and for Mr.

Lustig to accompany me to view the scene of the arrest in the instant proceeding.

10. Due to the nature of the charges, and the complexity in the instant proceeding, it appears necessary for reasonable effective assistance of counsel for me to conduct lengthy personal discussions with the defendant during the course of these proceedings.

11. The current facilities at 6th Avenue and C Street now have a curfew of 10:00 p.m. with regard to attorney visits.

12. There are three co-defendants in the instant case, and to my knowledge, at least one of the co-defendants, Gregory Pederson, is lodged at the 6th Avenue and C Street facility, such that both Mr. Pederson's counsel and myself will be competing for the only holding cell that has been nominated a conference room in the correctional facilities at 6th Avenue and C Street.

13. Due to physical structure at the facilities at 6th Avenue and C Street, there is a substantial likelihood that should I be forced to conduct confidential communications with my client during the course of these proceedings at the facility, that passing guards, prisoners, co-defendants, co-defense counsel, agents of the federal and state governments (Troopers, City Policemen, federal marshals) may overhear portions of my conversations in the hall at 6th Avenue and C Street.

FURTHER AFFIANT SAYETH NAUGHT.

DATED at Anchorage, Alaska, this 23rd day of April, 1976.

/s/ Phillip P. Weidner

SUBSCRIBED AND SWORN to before me this 23rd day of April, 1976.

/s/ Faye P. Methew
Notary Public in and for Alaska
My commission expires 6/25/78

PHILLIP P. WEIDNER
Attorney at Law
900 West Fifth Avenue
Anchorage, Alaska 99501
(907) 276-7000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,)
Plaintiff,)
)
v.)
GEORGE LUSTIG,)
Defendant.)
)

No. A-115-73 Cr.

MOTION FOR STAY OF PROBATION REVOCATION AND MOTION FOR ADMISSION TO BAIL

COMES NOW the defendant, George Lustig, by and through his attorney, Phillip P. Weidner, and hereby moves this Court pursuant to Criminal Rule 32(f), to stay the instant petition to revoke probation, and to continue the hearing on said petition until after the disposition of the defendant's motion for bail pending appeal in cause No. A-76-51 Cr., and if said bail is granted, until after said appeal.

Further, the defendant respectfully requests this Court to set bail in a reasonable amount pending said revocation, said amount to be satisfied by a property bond to be posted by the defendant.

This motion is made on the grounds that as reflected by the attached exhibit, and by the evidence to be presented in open court, it is imperative to the defendant that he be allowed to consult with his attorney of record in cause No. 76-3408 Civil

in the Superior Court for the State of Alaska in which his "putative" wife, Callie Newton is suing him for half of his real property. Thus it is imperative that the defendant be admitted to bail pending the disposition of his appeal before the Ninth Circuit in cause No. A-76-51 Cr. Further, the instant petition to revoke probation is bottomed on evidence and/or a conviction which it is the position of the defendant Lustig was unconstitutionally obtained.

Thus, should this Court deny defendant's motion for a continuance and bail, any time spent incarcerated between now and the disposition of said appeal, would constitute irreparable harm and injury to the defendant should he be successful in said appeal.

Further, it is the position of the defendant Lustig that should he be successful in said appeal, he has not made a final decision as to whether to waive his Fifth Amendment rights and take the stand in any retrial. Moreover, it is the position of the defendant Lustig that the instant conviction (in cause No. A-115-73) was the product of a purported plea of guilty obtained through threats of the United States government to punish for contempt the government witness purporting to be a friend of defendant Lustig. Further, the defendant Lustig wishes to present evidence as to the nature of said threats, and the resulting invalidity of the plea of guilty so as to constitute a manifest injustice pursuant to Criminal Rule 32(d). Thus, the defendant respectfully requests this Court to continue the instant probation revocation hearing until after his appeal, such that he is not forced to waive his Fifth Amendment privileges in a retrial in A-76-51 Cr. by taking the stand in the instant case.

Further, should this Court deny the defendant's motion to continue and in fact revoke probation, the effect of said revocation would be to have the defendant transported out of

the state such as to make it impossible for him to consult with his counsel in A-76-51 Cr. relative to perfecting the appeal in said proceedings.

Thus, for the foregoing reasons the defendant respectfully requests this Court to stay the instant probation revocation here and permit him a reasonable property bond pending the disposition of the appeal in A-76-51 Cr. such that he may enjoy his right to due process and counsel both as to the current civil suit in the Superior Court for the State of Alaska relative to his assets, and his current appeal before the Ninth Circuit in A-76-51 Cr. Further, the defendant respectfully requests the Court to take such action in order that he may fully explain to the Court the circumstances in which the original plea in the instant proceeding was entered and fully explain to the Court the circumstances surrounding the alleged activity leading to the instant revocation, without waiving his Fifth Amendment privileges in A-76-51 Cr. on any retrial.

Respectfully submitted at Anchorage, Alaska, this 30th day of August, 1976.

/s/ Phillip P. Weidner
Attorney at Law

PHILLIP P. WEIDNER
Attorney at Law
900 West Fifth Avenue
Anchorage, Alaska 99501
(907) 276-7000

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,)
Plaintiff,)
)
v.)
GEORGE LUSTIG,)
Defendant.)

No. A-115-73 Cr. **No. A-115-73 Cr.**

NOTICE OF OBJECTION TO UNCONSTITUTIONAL EVIDENCE AND UNCONSTITUTIONALLY OBTAINED CONVICTION

COMES NOW the defendant, George H. Lustig, by and through his attorney, Phillip P. Weidner, and hereby gives notice that he objects to the use in any pending probation revocation of any unconstitutionally obtained evidence, and any unconstitutionally obtained convictions. Further, the defendant respectfully directs this Court to his pre-trial motions and written motions for mistrial and defendant's motion for a new trial, in cause No. A-76-51 Cr. in which he lists numerous substantial points on appeal in said proceeding both as to the illegality of the evidence, the illegality of the manner in which the conviction was obtained, and the illegality of the present classification of cocaine.

Respectfully submitted at Anchorage, Alaska, this 30th day of August, 1976.

/s/ Phillip P. Weidner
Attorney for Defendant

APPENDIX E – RELEVANT PORTIONS OF TRANSCRIPT AS TO DOUBLE JEOPARDY, INVALIDITY OF INITIAL PLEA, AND MOTION FOR STAY TO WITHDRAW PLEA AND EXPLAIN STATEMENTS

CONCLUSION OF SENTENCING REMARKS OF U.S. ATTORNEY BEFORE JUDGE VON DER HEYDT IN CAUSE NO. A76-51 Cr. (U.S. DISTRICT COURT, ALASKA) (C.A. 9th NO. 76-2661) ON JULY 9, 1976

"We submit therefore, your Honor, he is deserving of the severest sentence as contemplated by Congress. We anticipate that the defendant will assert in regard to the sentencing considerations, they will say, 'Your Honor, after all, he will probable get five years from Judge Plummer on his probation violation, so subtract that from whatever you are thinking about and keep that in mind.'

Well, in that regard, we would say, first of all, that no one knows at this point in time what Judge Plummer will or will not do. Secondly, we feel that this case does warrant its own separate time, irrespective, in addition to whatever might be given him by Judge Plummer in that case. And we believe sincerely, your Honor, and strongly, that this case does warrant the imposition of the maximum sentence on each count in view of the disdain, the disregard and repetitive nature of this man's conduct, the [sic.] intellectual nartyr who urges others to violate our drug laws. And, your Honor, because of his following, because of his status among those who think that they are above the law, we do recommend that in order to have the maximum on each count, we recommend that the Court make a portion, your Honor, a portion of one count consecutive to the others so that we would have at least a 20-year sentence, because, your Honor, we feel that his conduct

is despicable and it is too persistent illegal conduct to condone and rule otherwise.

Thank you. [Tr. of July 9, 1976, at 17, 19] [Case No. A76-51 Cr., U.S. District Court, Alaska; C.A. 9th 76-2661]

PORTIONS OF SENTENCING REMARKS BY U.S. ATTORNEY AND DEFENSE COUNSEL BEFORE JUDGE PLUMMER IN CAUSE NO. A-115-73 Cr. (U.S. DISTRICT COURT, ALASKA) (C.A. 9th NO. 76-3146) ON SEPTEMBER 15, 1976

"MR. WEIDNER:

. . .

Just summing up on the consecutive sentence issue as to the legality, again it would be our position that trying to impose a consecutive sentence now increases the severity of the punishment, that if the United States wanted consecutive time the vehicle was through Judge von der Heydt. Mr. Edwards indicates that he specifically asked Judge von der Heydt not to consider the time. He didn't specifically ask him not to impose consecutive sentences. And there is a distinction. I do have a recollection of Mr. Edwards arguing to Judge von der Heydt he shouldn't consider the time Your Honor is going to impose. I took that to mean, and I think Judge von der Heydt took it to mean if he ran it consecutively he shouldn't consider the time, and he made almost the identical argument that he has made to Your Honor today, that there should be separate sentences, the implication being that Judge von der Heydt should have given him whatever time he wanted and ran it consecutively if he decided to.

MR. EDWARDS: I object to that, Your Honor, it's not true. It's not the record. It's specifically clear in terms of my assertions to the court that I did not want him in any way to take away from this court the ability to decide what sentence should be imposed, and nothing was said by Judge von der Heydt and I urge the court if it has any questions on this to confer with Judge von der Heydt. I think that defense counsel is improperly representing the record.

MR. WEIDNER: There is a record and Your Honor can certain review it. The point is that Judge von der Heydt did not impose consecutive time and I submit he is the man who had the jurisdiction to do so. If Mr. Edwards wants to indicate in the record where he specifically asked him not to impose consecutive time he can do so. But I submit it's not there and I think he was vague about any mention of what he meant by not considering it. I certainly interpreted it during the sentencing to mean that he should go ahead and give him separate time and the option was open for consecutive time.

Incidentally, Your Honor, there is an Alaska Supreme Court case adopting the general rule which is a good rule that you can't increase the severity of a sentence once it is imposed." [Tr. of September 15, 1976, at Page 24, 25] [Case No. A-115-73 Cr., U.S. District Court, Alaska; C.A. 9th 76-3146]

"Now directing my attention, first of all, to the question of consecutive time, *it would be our position that consecutive time can't be imposed under the double jeopardy clause of the United States Constitution and of course the Alaska Constitution as it applies to Mr. Lustig.* I have done some research in the area and I have not found cases directly in point. I have found a case that indicates quite clearly that *any increasing of a sentence once imposed, particularly in a probation situation, is double jeopardy, and it is a Ninth Circuit*

case. I would like permission of the court to file it with Your Honor at this time. I have served Mr. Edwards with a copy of it.

THE COURT: You may do that.

MR. WEIDNER: Also I have one of the latest cases on probation, from the Third Circuit.

THE COURT: They may be handed to the court.

MR. WEIDNER: If I might just briefly address myself to our position as to the legality of any contemplated consecutive time. First of all. Your Honor's finding for your jurisdiction today is I think quite property that *jurisdiction would lie under 18 United States Code 3653. That provision specifically provides* and if I might read directly from it – it's dealing of course with a revocation of probation and says at the bottom of the section. *'Thereupon the court may revoke the probation and require him to serve the sentence imposed or any lesser sentence and if imposition of sentence was suspended may impose any sentence which might originally have been imposed.'*

It would be our position that *first of all the statute specifically says "thereupon," that there is no mechanism by which a provision may be made that a sentence could be imposed after a certain amount of time.* It also *clearly draws a distinction between a suspended imposition of sentence and a suspended execution of sentence. As Your Honor well knows,* since you were the sentencing judge and the judgment is quite precise in its aspects, *this was a suspended execution of sentence.*

I would submit that *Your Honor cannot increase the severity by providing that it would consecutively with the new conviction.*

Now with regard to authorities for the proposition providing for sentences to run consecutively as opposed to concurrently is

an increase in severity, I would cite Borum v. United States, 409 F.2d 433. A Ninth Circuit case, a 1967 case. In that situation, Your Honor, the sentencing judge was sentencing on two counts of a contemporaneous conviction. There was no specificity as to consecutive time. The man was resentenced and the court held that increased the severity. So I think *Your Honor actually does not have jurisdiction to Impose consecutive time under the double jeopardy provision.*

I might point this out to the court. The question as to whether to enter upon probation is of course discretionary with the court, but it's also discretionary, I believe, with a defendant. That is, they can refuse probation and isist (sic.) they be given time and start serving the sentence. Mr. Lustig has been on probation for two years. I am quite aware of the case authority that he doesn't necessarily have a right to credit for time on probation but I think that also means that *when he made the decision to accept that probation in 1974 he did not contemplate that Your Honor would run any revocation consecutive to any further trouble he might have been in. The decision for any consecutive time lay with Judge von der Heydt.*

Mr. Edwards indicates that Judge von der Heydt somehow didn't know or didn't consider this. *If Your Honor will examine Judge von der Heydt's not only his sentencing remarks but his questioning of me in my argument, he specifically referred to this conviction.* He specifically indicated he felt there was difference between Mr. Lustig and the Petersons (sic.) precisely because of the instant conviction, that is, the one Your Honor is now sentencing him on. *It was a fact in that sentencing he had the authority to run the time consecutively and he chose not to do so.* So I think the man has been subject to double jeopardy in the instant case when your Honor first entered judgment and he has suffered jeopardy in A76-51 before Judge von der Heydt.

And for the U.S. Attorney to ask today for consecutive time is simply urging Your Honor to do something that would't be valid under the Constitution. (Tr. 9/15/76 at 21-24 Case No. A 115-73 Cr.) (Emphasis added)

REMARKS RELATING TO DESIRE FOR STAY TO EXPLAIN STATEMENTS AND TO WITHDRAW PLEA

HEARING ON PETITION TO REVOKE PROBATION 8/31/76

"MR. WEIDNER: Your Honor, there is one other portion of my written motion for the stay that I didn't address myself to just briefly –

THE COURT: Very briefly, please.

MR. WEIDNER: Very well. *Rule 32 provides that the court can set aside a plea if there is manifest injustice. I suspect, well, I know that Mr. Lustig may wish to take the stand to explain to Your Honor all the circumstances surrounding his initial entry of plea. This ties into the Fifth Amendment problem.*

THE COURT: Mr. Weidner, which original entry of plea?

MR. WEIDNER: The guilty plea before Your Honor in A-115-73.

THE COURT: *We went into the full circumstances of that and at one hearing Mr. Lustig wanted to equivocate and give lectures and things like that, so I refused to accept the plea. Later he changed attorneys and came in and wanted a further hearing.* We had at least two hearings. I know all the ins and outs of that so we needn't rehash that again.

MR. WEIDNER: Very well. *That is a part of the reason that we requested a stay. I wanted to let him have an opportunity, should he feel there is any further explanation necessary to explain why that plea was entered.*

THE COURT: *He had two opportunities to explain it.* If he

wanted to give me some after the fact stuff as to why he did it I, of course, would give greater credence to what he is telling me now. *We won't go into that.* We will go into, I have already ruled that I am going to stand on my previous rulings as to bail. Specifically, the court's orders of March 26 and April 2, 1976, are again reaffirmed." (Tr. of 8/31/76 at 40, 41).

SENTENCING ON PROBATION REVOCATION 9/15/76

"In regard to my prior convictions I think you are aware of the situation I was in with regard to (Trod Runnion) where he had been granted immunity. He had refused to testify on the stand and he was facing 18 months, *he had already been put in jail and he was facing an 18 unless I would agree to plead guilty and pay a $10,000 fine, and I was put in a position of either this man goes to jail whether I was guilty or not was not the issue, and if I plead guilty he would be released from jail, which he was and there would be no charges against him and I would be given probation. I was more or less put into an ethical bind there,* I mean I couldn't very well let this man go to jail if I could get off and pay a $10,000 fine. I think any man with integrity is going to make a guilty plea in that kind of situation. I think *that whole thing is a matter of record."* (Tr. of 9/15/76 at 40, 41). [Emphasis added]

HEARING ON PETITION TO REVOKE PROBATION 8/31/76

"THE COURT: *First of all are you going to offer evidence in the present matter?*

MR. WEIDNER: *I wanted to explain to Your Honor our exact position with regard to evidence which is entwined with the motion for the stay.*

THE COURT: *Well, explain that to me first.*

MR. WEIDNER: Certainly. The problem is, Your Honor, and we don't dispute that that transcript is correct. Mr. Lustig did

testify in A76-51, and I think those questions are accurate. I haven't reviewed the whole transcript so I don't know if the entire transcript is correct.

The problem is, Your Honor, Mr. Lustig does wish to explain to Your Honor precisely what circumstances lead to his being indicted and tried in A76-51, and what circumstances lead to these officers making a search. *Now he can't do that without waiving any Fifth Amendment privileges he may have on a retrial. We do have an appeal pending before the Ninth Circuit.* (Pp. 5)

. . .

I think we have an excellent chance of prevailing on appeal. (Pp. 5)

. . .

So we are in a position that Mr. Lustig does wish to take the stand and explain to Your Honor why he was charged in that case and also why he is before the court on a petition to revoke probation. He can't do that without totally waiving his Fifth Amendment rights on retrial. (Pp. 6)

. . .

We do wish to put on evidence but we are in a position that we can't put on evidence without gaining a final disposition on the appeal. (Pp. 6)

. . .

I would ask Your Honor to consider the motion for stay and the motion for admission to bail prior to literally forcing us to put on a case today. *If we do, again, Mr. Lustig would have to waive his Fifth Amendment privileges. I think that's a very important point.* (Pp. 7)

. . .

Thank you." (Tr. of 8/31/76; Pages 4-7) [Emphasis added]

"MR. WEIDNER: Your Honor, with regard to that –

THE COURT: *Just answer my question now. Does he wish to take the stand.*

MR. WEIDNER: *It is my understanding that he does not waive his Fifth Amendment rights.*

THE COURT: I am only asking if he wants to take the stand and testify in terms of finding whether there is a probation violation or not.

MR. WEIDNER: *I have consulted with my client and he advises me he does not want to take the stand.*

THE COURT: Well, I want to know so that Mr. Lustig doesn't later say you did that over his objection and contrary to some deep-seated conviction and he felt differently.

Do you concur in that statement by your attorney that you do not wish to testify at this hearing?

MR. LUSTIG: *I am acceding to his advice, sir.*

THE COURT: That isn't what I asked you. Do you waive your right to testify?

MR. LUSTIG: *I would like to make a statement.*

THE COURT: You can testify. You can be called as a witness, if that is what you wish to do.

MR. LUSTIG: *I am not aware of the way it might affect my appeal or the legal remifications.*

THE COURT: In your ex parte showing you said you wanted to testify, except that you didn't want to testify last April because then that would violate your Fifth Amendment rights, but you have testified now in Judge von der Heydt's court so you don't have that excuse now, or that ground, excuse me. So I am asking you now if you want to comply with your affidavit you made on April 2 of this year and testify at this hearing. Either yes or no.

MR. WEIDNER: Your Honor –

THE COURT: I am addressing the defendant. I know what you have stated. You are on the record.

MR. LUSTIG: *I don't feel I can give a yes or no answer without qualification. It's just not a question I feel I can answer that way.*

THE COURT: Do you wish to be sworn and testify?

MR. LUSTIG: My attorney advises me not to.

THE COURT: You retained your attorney, did you not?

MR. LUSTIG: Yes.

THE COURT: Very well.

MR. EDWARDS: May I ask, Your Honor, I gather he is desirous of following the advice of his attorney at this time?

THE COURT: It's evident that's what he has done.

MR. EDWARDS: May that specific question be posed to him so he can respond to that question.

THE COURT: *Do you elect to follow the advice of your counsel? Yes or no?*

MR. LUSTIG: *Yes. Now that I have answered yes or no could I make one comment?*

THE COURT: *I don't think it will be necessary.* Decision will be reserved. Court will stand in recess until the call of the gavel." (Tr. of 8/31/76 at 45-47) [Emphasis added]

PORTIONS OF TRANSCRIPT RELATING TO VALIDITY OF INITIAL PLEA

INITIAL PLEA OF 5/4/72 to 21 U.S.C. 176(a)

"Q. *Was the plea of guilty* which you entered a moment ago to Count II *made voluntarily* by you and of your own free will?

A. *It was a moral conviction,* Your Honor.

Q. *Is it voluntary and of your own free will?*

A. *It is my moral conviction so I guess it is, sir.*

Q. Well, I'm not concerned with moral or religious

convictions. *The court has to be satisfied* as I read to you from the law *that the plea is made voluntarily*, with understanding of the nature of the charge and the consequences of the plea. (Pp. 4)

. . .

Q. Well, was your plea of guilty today influenced by threats that were made to people other than yourself?

A. Not to me.

Q. *Do you contend then that threats have been made to other persons and that is influencing you in pleading guilty?*

A. *The way I see it is another man will go to jail unless I do.*

THE COURT: *Mr. Page, I don't see how I can accept a plea of guilty.*

MR. PAGE: *Neither do I, your Honor.* (Pp. 5-6)

. . .

THE DEFENDANT: *I am bound to answer truthfully and that is what I am doing.*

THE COURT: *Well, we will go through the rest of the routine then.* (Pp. 6)

. . .

Q. Is your plea of guilty today the result of any threats or pressures by anyone, jailers, inmates, FBI, police, Customs agents, members of your family, friends, or anyone else?

A. No. I personally have not been threatened.

Q. Has your plea of guilty today been induced or in any way influenced by fear for yourself, family, lover, anyone; or to protect family, lover, or anyone; or to aid others in connection with crime?

A. *Your Honor, I'm really having a hard time making a distinction between formality and truth here.* (Pp. 14)

. . .

Q. Now, I think my last question was: Was your plea of guilty

induced or influenced in any manner by fear or concern for yourself, your family, relatives, anyone else, or to protect your family, your wife, or anyone else, or to aid others in connection with crime?

A. No one has overtly approached me from this standpoint but I know in my mind there is a practical reality what is involved here but no one has tried to coerce me overtly. (Pp. 16)

Q. In what manner, if any, has this influenced or induced you to plead guilty?

A. *I know that as a moral righteous person this is what I have to do and no one has tried to influence me.*

THE COURT: Mr. Page?

MR. PAGE: *Your Honor, I suspect that Mr. Lustig's reservations* which are not clearly stated on this record, *are based on the fact that Trod Runyon, the recalcitrant witness, has been sent to jail for civil contempt for failing to answer questions.* And I suspect that Mr. Lustig is at this time referring to the fact that Mr. Runyon is in jail and I would like to explore or permit counsel to question him as to whether he realizes how little control and that the fact of this plea here won't have any impact on Mr. Runyon's future. Perhaps the court can ascertain on the record whether this is the nature of his apparent hesitance. (Pp. 16)

. . .

Q. Now, it is also true that you are personally acquainted with Trod Runyon, who is now in jail for civil contempt?

A. True.

Q. Now, has anybody at any time ever represented to you as a fact that your decision to plead guilty would have any effect on Mr. Runyon's fate?

A. No.

Q. Do you have any objective reason by way of anybody else's telling you so, anybody else with the authority to do so having told you that your decision would somehow be intermingled with Mr. Runyon's fate in this matter?

A. *I know that the reason Mr. Runyon is in there is because of this situation, and I know that in order to resolve this situation I know what I have to do.* (Pp. 18)

. . .

Now, what has prompted you to change your mind to now plead guilty after having three times made the other choice?

A. *On the other occasions I believe that I was the only one that had to stand the consequences. Now this situation is different.*

Q. In other words, I would interpret that that *you are pleading guilty today thinking that you will suffer the consequences and that perhaps Mr. Runyon and Mr. Green will be spared that; is that correct?* (Pp. 22)

. . .

MR. PAGE: Your Honor, I would like to ask him a couple of questions concerning this thing of Mr. Runyon.

THE COURT: You may.

BY MR. PAGE:

Q. Mr. Lustig, you witnessed all of the transactions in which Trod Runyon was involved in this court during the course of this trial, didn't you?

A. That's correct.

Q. You heard all of the law read to him from the bench concerning civil contempt, criminal contempt and all of that, did you not?

A. That's correct.

Q. *Do you have any belief that you will have any legal*

control over his destiny by virtue of whether or not you plead guilty?

A. *I have to say that I know as a personal reality that this is the case. I know that Mr. Watson wrote a letter to his probation officer saying to sock it to him because he didn't cooperate the last time."* (Pp. 25) [Emphasis added] (Tr. of 5/4/72)

ATTEMPTED ENTRY OF PLEA TO 18 U.S.C. 545 INFORMATION (REJECTED)

MR. PAGE:

"At the time the plea was negotiated the government agreed to make a recommendation of term of five years imprisonment to be suspended on conditions of probation and a fine of $10,000.00 on the understanding that Mr. Lustig could in fact pay such a fine.

Since that agreement was made the United States Supreme Court in the case of Bradley v. United States has ruled that any sentence under Section 176(a) must be in accordance with the legislation requiring a mandatory minimum of five years. *In other words, the Bradley case will not permit this court to follow the recommendation which the government agreed to make.* (Pp. 2)

. . .

If in fact Mr. Lustig sees fit to proceed as I have outlined, Mr. Rubinstein will, after plea and sentence, move the court to permit Mr. Lustig to withdraw his plea of guilty to the former charge and the government will not oppose that and will move to dismiss it. (Pp. 3)

. . .

MR. RUBINSTEIN:

. . .

And the *reason for these proceedings essentially is so that Mr. Lustig could get the benefit of the original promise which Mr.*

Page made to him and which the court has indicated it would go along with." (Tr. of 6/21/73 at 2, 3, 8) (Pp. 18) [Emphasis added]

"THE COURT: *So if you want to sign it and proceed by information, sign it voluntarily, you may do so and if not, why then the only recourse or alternative – the court has no alternative, we will go ahead and sentence you on your plea of guilty to Count II of the indictment, I guess.*

THE DEFENDANT: Of the other indictment;

THE COURT: Yes. This is an information, this isn't an indictment.

MR. RUBINSTEIN: The record may reflect that Mr. Lustig has signed the waiver of indictment. (Pp. 14)

. . .

Q. Unless your plea is knowingly, understandingly, freely, voluntarily and intelligently made and unequivocal, I cannot accept it and *in that event I suppose we proceed to sentence you on your previous plea, on the indictment where there is a mandatory sentence required. In other words I just can't accept a plea that is equivocal or evasive or conditional.*

A. Your Honor, when I answered the questions before I wasn't being equivocal or evasive. *I made a distinction between the actual truth of the situation and what is required by the formality of the questions and answers and that doesn't change now. I'll give the right answers.*

Q. *No, this isn't a game.* I explained that to you the other time when you were here back on May 4th, I believe it was, 1973. (Pp. 17)

. . .

Q. Were threats, promises of leniency or promises of any nature made to you to induce or persuade you to plead guilty"

A. Well, I think that could be one of those sticky questions.

Q. One of those what?

A. Sticky questions that involves a distinction between formality and the objective reality of what happened.

Q. *Were any threats made to induce or persuade you to plead guilty?*

A. *Well, none other than that Runyan was in jail and that he had the chance of getting criminal contempt for a year and a half.* (Pp. 19)

. . .

A. *I was faced with the choice of him getting a criminal contempt charge or pleading guilty and paying the fine.* (Pp. 19)

. . .

A. Well, no. This was the actual situation. *He was in jail. I was advised by two different lawyers that he was possibily liable for criminal contempt* which carries a sentence *up to 18 months* and *this was the whole implication of the thing. It was something that was being held over me.* I went along with it *and I'm still going along with it. I'm just answering your questions truthful about the thing.* (Pp. 20)

. . .

A. I want you to understand that I'm not trying to mess up the proceedings or cloud the record.

Q. No. I'm not saying you are messing up the proceedings and I don't like you using those expressions, this is no proceeding, this is determining whether your plea is made freely, voluntarily and as required by law. *It is immaterial to me whether I sentence you on this or sentence you on the other one.*

What is the reason or your motive for your plea of guilty today?

A. *Today? Because now the situation is changed from one of which I was to plead guilty – I'm talking about a year ago –*

plead guilty, pay $10,000 or it would be prosecution of Runyon on a contempt charge. . . (Pp. 20)

. . .

A. *Now the situation is changed* to one of which I either go to jail for five years under – I mean, it is a different set of circumstances now. It's a different ball game. *I go to jail for five years or I plead guilty to this.* And again I say I'm not saying that I am not guilty of the charge that is on the paper. *It's a whole different situation.* (Pp. 21)

THE COURT: *The court is not going to accept the plea.* I am not going to equivocate and argue with the defendant and engage in a battle of semantics so the plea will not be accepted.

Are you prepared to proceed with the imposition of sentence in the matter entitled United States of America versus Geurge Lustig, No. A-79-69, criminal?

THE DEFENDANT: Your Honor, I want to give you the right –

THE COURT: *No, I don't want to hear any more from you. I gave you your opportunity and if you want to play games with the court that is fine.*

THE DEFENDANT: I'm not playing games, your Honor.

THE COURT: Mr. Page, do you have any recommendation to make in connection with the plea of guilty as to Count II that was entered on May 4, 1972? (pp. 26)

. . .

The factual situation is such as to relieve the government of its original plea bargaining regardless of the Bradley case. Nonetheless, the government is required to make a recommendation consistent with the law and *it is therefore the recommendation of the government under Bradley that Mr. Lustig be sentenced to a term of five years in jail in accordance with the requirements of Section 176(a)* (Pp. 28)

THE COURT: Thank you." (Tr. of 6/21/73 at 13, 14, 17, 19, 20, 21, 26, 28). [Emphasis added]

REENTRY OF PLEA TO 18 U.S.C. 545 INFORMATION BY STIPULATION

"THE COURT: Mr. Roberts do you have any statements or recommendation to make on behalf of the United States Attorney's office?

MR. ROBERTS: Yes, your Honor, the defendant's counsel and the United States Attorney have entered into a stipulation which we tender to the court at this time. This stipulation does have our recommendation in it.

THE COURT: Thank you. The court has read and considered the stipulation and has approved the same and signed it and it may now be filed." (Tr. of 5/3/74 at 2)